(13)

No. 95-809

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LOCKHEED CORPORATION, *et al.*,
Petitioners,

v.

PAUL L. SPINK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE*

New England Legal Foundation ("NELF") is a non-profit public interest law firm whose membership consists of corporations, individuals, and others who believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has appeared regularly in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the business community.

A number of NELF's members and supporters, including insurance companies and accounting firms, provide services to employee benefit plans. As such, they are "parties in interest" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* NELF is concerned with the Ninth Circuit's holding in this case that a party in interest may be liable for equitable relief for participating in a prohibited transaction under ERISA. ERISA precludes a fiduciary from knowingly causing a plan to pay more than "reasonable compensation" for services provided to the plan; it imposes no complementary obligation on the service provider. 29 U.S.C. §§ 1106(a)(1)(C), 1108(b)(2). Application of the Ninth Circuit's rule would make the service provider the guarantor of the fiduciary's obligation. Under this rule, a service provider could be

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* The parties have consented to the filing of this brief. Amicus has filed letters of consent with the Clerk.

required to return to an employee benefit plan any "excess compensation" paid by the plan, if a court determines after the fact that the plan paid more than reasonable compensation for the services. Such liability is particularly pernicious because it is without fault; a service provider's fees might be deemed unreasonable even if the provider charged the plan its ordinary fees, readily paid by other customers or clients. ERISA imposes an obligation on fiduciaries to look after plan assets; it places no such responsibility on service providers and other nonfiduciary parties in interest.

SUMMARY OF ARGUMENT

The Ninth Circuit in this case held Lockheed Corporation liable for equitable relief as a party in interest to a prohibited transaction under ERISA. ERISA imposes no such liability. By the plain language of ERISA section 406, 29 U.S.C. § 1106, only fiduciaries are prohibited from engaging in certain transactions. Equitable relief under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), is available only against those who violate a provision of ERISA Title I. Because participation in a prohibited transaction is not a violation of ERISA Title I for parties in interest, there is no relief against them under section 502(a)(3).

ERISA provides a carefully crafted and detailed enforcement scheme related to prohibited transactions, including enforcement against parties in interest, that precludes inference of any equitable relief against these parties. Part 4 of Title I of ERISA concerns fiduciary responsibility, and section 502(a)(3) establishes liability for violations of Part 4. Internal Revenue Code section 4975, 26 U.S.C. § 4975, enacted as part of Title II of ERISA, creates an enforcement mechanism against certain

parties in interest for participation in prohibited transactions. ERISA's language and legislative history reveal a deliberate separation of prohibited transaction enforcement: Fiduciary responsibility is the province of ERISA Title I, consistent with the traditional trust law focus on fiduciaries, while parties in interest are the subject of the tax code. Indeed, Congress expressly rejected an earlier provision for party in interest liability under ERISA Title I. There is no such liability in ERISA as enacted.

Mertens v. Hewitt Associates, 508 U.S. 248, 113 S.Ct. 2063 (1993), also directs the result here. This Court indicated in *Mertens* that nonfiduciaries are not liable under ERISA for knowing participation in a fiduciary breach because ERISA nowhere expressly prohibits such participation. A prohibited transaction under ERISA is no more than a statutorily defined fiduciary breach. If, as *Mertens* suggests, there is no nonfiduciary liability for participating in a fiduciary breach, it follows that there is no nonfiduciary party in interest liability for a prohibited transaction. Despite the existence of certain dicta in *Mertens* suggesting that parties in interest may be liable for equitable relief, the logic of that opinion precludes any such liability.

ARGUMENT

ERISA section 406, 29 U.S.C. § 1106, defines a prohibited transaction as a form of fiduciary breach. That statutory section describes each such transaction as a prohibition on fiduciary conduct. The Ninth Circuit in this case declared that Lockheed's amendment of its employee benefit plan to create early retirement incentive programs was a prohibited transaction under section 406. Amicus agrees with the petitioners that the Ninth Circuit's

prohibited transaction ruling thereby incorporated implicitly a holding that Lockheed's amendment of the plan was a fiduciary act. Amicus agrees with the petitioners as well that this holding is reversible error.

Amicus in this brief challenges an interrelated portion of the Ninth Circuit's decision. While the Ninth Circuit denied holding that Lockheed's plan amendment was a fiduciary act, Pet. App. 14a n.5, despite the necessity of its having done so, the court held explicitly that Lockheed was liable under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), as a party in interest who benefited from a prohibited transaction, irrespective of Lockheed's fiduciary status. Pet App. 14a-15a. That holding also is error.

Amicus is aware that certain language in *Mertens* indicates that a party in interest who participates in a prohibited transaction may be held liable for equitable relief under ERISA section 502(a)(3). *See* 113 S.Ct. at 2067 n.4, 2071-72. To the extent these dicta can be read as declaring liability under ERISA section 502(a)(3) for parties in interest who are not also fiduciaries, the present amicus contends that these statements in *Mertens* do not accurately describe the law. Indeed, these statements are inconsistent with the logic of the *Mertens* opinion. Nonetheless, some courts of appeals have used these dicta to support a conclusion that section 502(a)(3) creates party in interest liability. *E.g.*, *Reich v. Stangl*, 73 F.3d 1027, 1031-32 (10th Cir. 1996); *Landwehr v. DuPree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 (1st Cir. 1994) (dictum). Amicus asks that the Court expressly disavow its *Mertens* dicta and declare in error these courts of appeals and the Ninth Circuit's holding in the present case.

I. ERISA Contains a Carefully Integrated Set of Enforcement Provisions That Precludes Equitable Relief Against Nonfiduciary Parties In Interest

ERISA Title I, Part 4 is entitled "Fiduciary Responsibilities." Contained within that Part is ERISA section 406, 29 U.S.C. § 1106, which defines certain prohibited transactions. By its plain language, section 406 describes each prohibited transaction as a restriction on fiduciary conduct. For example, section 406(a)(1)(D), at issue here, declares that "A *fiduciary* with respect to a plan shall not cause the plan to engage in a transaction, if *he* knows or should know that such transaction constitutes a direct or indirect ... transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D) (emphasis added). Only fiduciaries are obligated not to engage in such transactions. There is nothing in ERISA section 406 that prohibits a party in interest who is not also a fiduciary from engaging in any of the transactions described therein.

ERISA section 502(a) provides for civil enforcement of the other provisions of ERISA Title I. Section 502(a)(3), upon which the Ninth Circuit and the respondent relied in this case, allows a civil action by a plan participant, beneficiary, or fiduciary to enjoin, or obtain other appropriate equitable relief for, "any act or practice which violates any provision of this title." 29

U.S.C. § 1132(a)(3).[1] The participation in a prohibited transaction by a party in interest who is not a fiduciary is not a violation of any provision of Title I. There is, therefore, no liability under section 502(a)(3) for such a party in interest. As this Court recently reemphasized, "Section 502(a)(3) 'does not, after all, authorize "appropriate equitable relief" *at large*, but only "appropriate equitable relief" for the purpose of "redress[ing any] violations or ... enforc[ing] any provisions" of ERISA or an ERISA plan.'" *Peacock v. Thomas*, No. 94-1453, slip op. at 3-4 (U.S. Feb. 21, 1996) (quoting *Mertens*, 113 S.Ct. at 2067) (emphasis original).

Because the plain language of ERISA sections 406 and 502(a) does not establish party in interest liability, affirmance of the Ninth Circuit's rule would require this Court to infer a cause of action. No such inference is permissible. This Court has twice expressed its "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 113 S.Ct. at 2067 (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)).

The Court explained in *Mertens* that nonfiduciaries are very likely not liable under ERISA for knowing participation in a fiduciary breach, even though such

[1] Section 502(a)(5), 29 U.S.C. § 1132(a)(5), allows an identical action by the Secretary of Labor.

liability was well established under the common law, because ERISA nowhere expressly prohibits such participation. 113 S.Ct. at 2067. The Court noted that "only some common-law 'nonfiduciaries' are made subject to [a duty not to assist in a fiduciary's breach], namely, those who fall within ERISA's artificial definition of 'fiduciary.'" *Id.* at 2068 n.5. That conclusion directs the result here. A prohibited transaction under ERISA is no more than a statutorily defined fiduciary breach. Every prohibited transaction under ERISA section 406 is also a fiduciary breach under section 404, 29 U.S.C. § 1104, and section 404, like section 406, places the burden for avoiding the fiduciary breach on the fiduciary, where it traditionally falls. If, as *Mertens* indicates, there is no nonfiduciary liability—knowing or otherwise—for participating in a fiduciary breach, it follows that there is no nonfiduciary party in interest liability for a prohibited transaction. Accordingly, despite the existence of certain dicta in *Mertens* suggesting that parties in interest may be liable for equitable relief, the logic of that opinion precludes any such liability.[2]

[2] In *Mertens*, the Court mistakenly observed that, pursuant to ERISA sections 406(a) and 408(b)(2), a party in interest may not offer services to the plan for more than "reasonable compensation." 113 S.Ct. at 2067 n.4. On that basis, the Court assumed that parties in interest may be liable for participating in a prohibited transaction. *Id.* at 2071-72. But neither section 406 nor section 408 impose any restriction as to the price the party in interest may seek for the services it provides the plan. Instead, these sections only direct the *fiduciary* not to contract for services necessary for the operation or establishment of the plan at

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This Court should not infer a cause of action against nonfiduciary parties in interest under ERISA sections 502(a)(3) and (5) precisely because ERISA provides a "carefully crafted and detailed enforcement scheme" related to prohibited transactions, including enforcement against parties in interest, which does not include equitable relief against nonfiduciary parties in interest. Part 4 of Title I of ERISA concerns fiduciary responsibility, and sections 502(a)(3) and (5) establish liability for violations of Part 4. Internal Revenue Code ("IRC") section 4975, 26 U.S.C. § 4975, enacted as part of Title II of ERISA, creates an enforcement mechanism against certain parties in interest for participation in prohibited transactions.

Section 4975 imposes a two-tiered excise tax on any "disqualified person who participates in [a] prohibited transaction (other than a fiduciary acting only as such)." 26 U.S.C. § 4975(a). The Internal Revenue Code defines "disqualified person" almost identically to "party in interest" under ERISA. *Compare* 26 U.S.C. § 4975(e) *with* 29 U.S.C. § 1002(14). Disqualified persons (other than fiduciaries acting only as fiduciaries) are subject to a 5 percent excise tax on each prohibited transaction. If the transaction is not corrected within the taxable period

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"more than reasonable compensation." 29 U.S.C. § 1108(b)(2). Because the premise of the dicta—that a party in interest, like a fiduciary, is prohibited from engaging in a prohibited transaction—is not founded in the statutory language, the complementary conclusion that a party in interest is liable for a prohibited transaction also must fail.

following imposition of the 5 percent tax, the disqualified person is subject to a tax equal to 100 percent of the amount involved in the prohibited transaction. 26 U.S.C. § 4975 (a), (b).

Congress provided for excise tax liability against parties in interest in the Internal Revenue Code; it provided for equitable relief against fiduciaries in ERISA Title I.[3] Congress did not "simply forget" to provide for equitable relief against parties in interest in ERISA Title I, just as it did not simply forget to provide for an excise tax against pure fiduciaries, *i.e.*, "fiduciaries acting only as such," in the Internal Revenue Code.[4]

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[3] There is a strong argument that the IRC section 4975 tax is applicable only to parties in interest who are also fiduciaries. *See* n. 7 *infra*. That is, ERISA may impose no liability on nonfiduciaries at all, either under Title I or Title II (the tax provisions). *See Mertens*, 113 S.Ct. at 2068 n.5 ("only some common-law 'nonfiduciaries' are made subject to [a duty not to assist in a fiduciary's breach], namely, those who fall within ERISA's artificial definition of 'fiduciary'"). Regardless of the scope of party in interest liability under IRC section 4975, however, it is plain that ERISA sections 502(a)(3) and (5) reach fiduciaries only, and provide no cause of action against nonfiduciary parties in interest.

[4] ERISA section 502(i) reinforces the exclusivity of the remedies under ERISA section 502 and IRC section 4975. Section 502(i) calls for the Secretary of Labor to impose a 5 percent/100 percent "civil penalty"—akin to the IRC section 4975 excise tax—on a party in interest engaging in a prohibited transaction, *but only for prohibited transactions related to plans of a type not covered by IRC*

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Section 502(a)(3) and (5) enforcement against nonfiduciary parties in interest would be particularly anomalous if, as some have argued, 502(a)(3) and (5) party in interest liability is without fault. Civil liability against a fiduciary for a prohibited transaction with a party in interest requires knowing participation on the part of the fiduciary. See ERISA § 406(a)(1), 29 U.S.C. §1106(a)(1) ("A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, *if he knows or should know* that such transaction ...") (emphasis added). In contrast, to the extent section 406 can be read to prohibit a party in interest from participation in a prohibited transaction, there appears to be no similar scienter requirement. Thus, a party in interest could be held liable, under the Ninth Circuit's rule, for *nonknowing* participation in a prohibited transaction.

Such a result would be disastrous in practice. For example, ERISA section 406(a)(1)(C), in conjunction with section 408(b)(2), prohibits a fiduciary from causing a plan to pay more than "reasonable compensation" for services. 29 U.S.C. §§ 1106(a)(1)(C), 1108(b)(2). A

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section 4975. 29 U.S.C. § 1132(i). Those non-pension plans are not relevant here.

It is uncertain whether the section 502(i) civil penalty applies to nonfiduciary parties in interest. It should not. ERISA section 502 is merely an enforcement provision; it creates no new liability. ERISA section 406 establishes that nonfiduciary parties in interest are not precluded from participation in a prohibited transaction. Regardless, the scope of section 502(i) liability is not an issue in this case.

party in interest under ERISA includes any plan service provider. 29 U.S.C. § 1002(14)(B). A service provider who charges a plan the same rate it charges its other customers could be liable, under the Ninth Circuit' rule, to return "excess compensation" to the plan if a court later determines that the provider's rate was not "reasonable." Similarly, if a fiduciary unthinkingly accepted a service provider's perhaps high-priced opening offer without negotiating, the innocent service provider and the imprudent fiduciary would be equally liable to restore the plan's losses. Imposing nonfiduciary liability in either circumstance would make the service provider the guarantor of the fiduciary's duty to ensure that the plan does not overpay for services.[5] There is nothing in ERISA that supports such a regime. Indeed, strict liability against nonfiduciaries is at war with a statutory scheme principally concerned with fiduciary responsibility that nonetheless requires scienter before establishing fiduciary liability.

Strict liability against nonfiduciaries also is inconsistent with traditional trust law principles, which form the basis of the ERISA Title I provisions. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989). The equitable remedies imposed against nonfiduciaries under the common law of trusts were

[5] The preceding scenarios are more than hypothetical. The Secretary of Labor has brought strict liability claims against service providers and other parties in interest in several cases, relying on the Ninth Circuit's rule. *See, e.g.*, *Reich v. South Carolina National Bank, et al.*, CV-92-L-2858-NE (N.D.Ala.); *Reich v. Fowler*, 89 Civ 0224 (S.D.N.Y.).

limited to those nonfiduciaries who knowingly participated in breaches of fiduciary duty. *See, e.g.*, Restatement (Second) of Trusts § 326 (1959) (a "third person who ... *has notice that the trustee is committing a breach of trust* and participates therein is liable to the beneficiary for any loss caused by the breach of trust") (emphasis added); *id.* comment a ("If a third person participates with the trustee in committing a breach of trust, *knowing that he is committing a breach of trust*, he is liable to the beneficiary for participation in the breach of trust.") (emphasis added). Absent such evidence of affirmative actions knowingly aiding and abetting a breach, common law courts refuse to impose liability. *Id.* The key to third party liability "is whether the third person knew or should have known that he was taking part in a breach." G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* § 901, p. 262 (rev. 2d ed. 1982).

In *Mertens*, this Court suggested strongly that ERISA creates no cause of action against a nonfiduciary for *knowing* participation in a fiduciary breach, despite the fact that such claims are available under the common law, because ERISA contains no express language creating such a claim. 113 S.Ct. at 2067. It would be ironic indeed if ERISA were nonetheless to create a claim for *nonknowing* participation by a nonfiduciary party in interest in a prohibited transaction in the absence of supporting language and contrary to the common law.

II. ERISA's Legislative History Establishes Unequivocally That ERISA Title I Does Not Impose Liability on Nonfiduciary Parties In Interest

Congress considered carefully the possibility of civil liability against a party in interest for participation in

a prohibited transaction, and rejected it. The Senate version of the bill that became ERISA contained an express provision for party in interest liability:

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.

S.4, 93d Cong., 1st Sess. § 15(h) (1973), *reprinted in* Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* ("*Legislative History*") at 1450 (1976). *See also* S.1179, 93d Cong., 1st Sess. § 501(d)(17) (1973), *Legislative History* at 955-56. The original House bill contained no provision for liability against parties in interest, but provided only for fiduciary liability for participation in prohibited transactions. *See* H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974) ("Conference Report"), *reprinted* in 1974 U.S.C.C.A.N. 5038, 5075.

The conference resolved the differences between the bills by adopting the present system of divided enforcement. Fiduciary responsibility is the province of ERISA Title I, consistent with the traditional trust law

focus on fiduciaries, while parties in interest are the subject of the tax code:[6]

> The conference substitute establishes rules governing the conduct of plan fiduciaries under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "parties in interest" under the labor provisions) with respect to the plan under the tax laws (title II). This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries. The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules; this is similar to the approach taken under the present rules against self-dealing that apply to private foundations.

Conference Report, 1974 U.S.C.C.A.N. at 5076. Title I prohibits *only fiduciaries* from engaging in certain transactions: "The labor provisions deal with the structure of plan administration, provide general standards of

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[6] The rejected provision for party in interest liability in the Senate bill would have imposed liability only for knowing participation in a prohibited transaction. The Ninth Circuit's rule would bring back such liability on a nonknowing basis.

conduct for fiduciaries, and make certain specific transactions 'prohibited transactions' *which plan fiduciaries are not to engage in.*" *Id.*, 1974 U.S.C.C.A.N. at 5076 (emphasis added). *See also id.* at 5087 ("Under the labor provisions (title I), the fiduciary is the main focus of the prohibited transaction rules. ... On the other hand, the tax provisions (title II) focus on the disqualified person.").

The discussion of liability in the Conference Report emphasizes that only fiduciaries, and parties in interest not covered by IRC section 4975, are subject to liability under Title I of ERISA (and these parties in interest are subject only to the 5 percent/100 percent civil penalty of section 502(i)). Other parties in interest are subject only to the section 4975 excise tax:

> *Civil liability*
>
> *Fiduciaries.*—Under the labor provisions (but not the tax provisions) of the substitute, a fiduciary who breaches the fiduciary requirements of the bill is to be personally liable for any losses to the plan resulting from this breach. ... .
>
> *Party-in-interest.*—A party-in-interest who engages in a prohibited transaction with respect to a plan that is not qualified (at the time of the transaction) under the Internal Revenue Code may be subject to a civil penalty of up to 5 percent of the amount involved in the transaction. If the transaction is not corrected after notice from the Secretary of Labor, the penalty may be up to 100 percent of the transaction.

...

Excise tax on prohibited transactions

> *In general.*—As indicated above, the substitute establishes an excise tax on disqualified persons who participate in specific prohibited transactions respecting a pension plan. The tax applies with respect to a plan which has qualified after the effective date of the prohibited transaction provisions ... .

Conference Report, 1974 U.S.C.C.A.N. at 5100-01.

Finally, Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, upon introducing the Conference Report, explained that enforcement of fiduciary duties belongs to the Secretary of Labor under ERISA Title I, but parties in interest not subject to the section 502(i) civil penalty are solely within the domain of the Internal Revenue Service:

> Under the conference substitute, enforcement of the fiduciary provisions would primarily lie with the Secretary of Labor who would be empowered to bring civil actions to redress or restrain violations *on the part of fiduciaries*. He is also authorized to impose civil penalties on parties in interest who participate in prohibited transactions with welfare plans which are not subject to the tax qualification provisions of the Internal Revenue Code. *However, the Internal Revenue Service would have responsibility for dealing with those who are "disqualified persons"*—similar to parties in interest defined in the labor portion of the conference substitute—with authority to impose excise taxes on violators.

Statement by the Hon. Harrison A. Williams. Jr. Upon Introducing the Conference Report on H.R. 2 ("Williams Statement"), *reprinted in* 1974 U.S.C.C.A.N. at 5177, 5188 (emphasis added).

ERISA's legislative history reveals that Congress did not inadvertently omit nonfiduciary party in interest liability from the comprehensive enforcement scheme set out in the statute. Congress deliberately declined to place on nonfiduciary parties in interest liability for equitable relief.

III. The Arguments of the Courts of Appeals That Have Found Party In Interest Liability Are Unpersuasive

None of the courts of appeals that have found party in interest liability under ERISA section 502(a) have considered the integrated enforcement scheme or the extensive legislative history discussed above. Rather, these courts have relied largely on the decisions of other courts, and this Court's dicta in *Mertens*. *See* Pet App. 15a; *Stangl*, 73 F.3d at 1030-32; *Reich v. Compton*, 57 F.3d 270, 285-86 (3d Cir. 1995). Substantive analysis in these cases has been confined to two principal arguments, neither of which can be squared with the language and history of ERISA.

Several courts have relied on the apparent breadth of the enforcement language in ERISA sections 502(a)(3) and (5). Thus, the *Compton* court concluded that section

502(a)(3) applies to parties in interest because "section 502(a)(3)'s language expressly grants equitable power to redress violations of ERISA [and] prohibited transactions plainly fall within this category." 57 F.3d at 285-86 (internal quotations omitted). The court in *Rowe* noted similarly that section 502(a)(5) "reaches 'acts or practices' that violate ERISA and prohibited transactions violate § 1106." 20 F.3d at 31 n.7.

The problem with these syllogisms is that one of the material premises is false. Prohibited transactions are *not* violations of ERISA for parties in interest; ERISA section 406 only makes it illegal for a *fiduciary* knowingly to engage in, or cause a plan to engage in, a prohibited transaction. Little more need be said on this point given this Court's recent pronouncement on the issue, already noted: "Section[s] 502(a)(3) [and (5)] 'do[] not, after all, authorize "appropriate equitable relief" *at large*, but only "appropriate equitable relief" for the purpose of "redress[ing any] violations or ... enforc[ing] any provisions" of ERISA or an ERISA plan.'" *Peacock*, slip op. at 3-4 (quoting *Mertens*, 113 S.Ct. at 2067) (emphasis original). Accordingly, there is no liability against nonfiduciary parties in interest under sections 502(a)(3) and (5) for participation in a prohibited transaction.

Some courts of appeals have reached the same erroneous result about party in interest liability by relying upon IRC section 4975(h). That section requires the Secretary of the Treasury to notify the Secretary of Labor before sending a notice of deficiency with respect to the disqualified person excise tax. The notice is meant to provide the Secretary of Labor "a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax." 26 U.S.C. § 4975(h). These courts have been too quick to conclude that the statute's contemplation that the Secretary of Labor

may "obtain a correction" of the prohibited transaction implies that the Secretary can sue a party in interest for restitution or rescission. *Stangl*, 73 F.3d at 1034; *Compton*, 57 F.3d at 286.

The conclusion does not follow. The section 4975(h) notice allows the Secretary of Labor only the "opportunity" to obtain a correction; he will not necessarily be able to achieve that result through civil suit in all cases. IRC section 4975(f)(5) defines a "correction" with respect to a prohibited transaction as "undoing the transaction ***to the extent possible***, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." 26 U.S.C. § 4975(f)(5) (emphasis added). Nothing in this definition requires, or necessarily implies, that such correction will be accomplished through civil suit against a nonfiduciary party in interest.[7] Where a disqualified person is also a

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[7] The reference in section 4975 to a disqualified person "acting under the highest fiduciary standards" implies strongly that the section 4975 excise tax applies only to disqualified persons who are also fiduciaries. This conclusion is bolstered by the fact that section 4975 calls on the Secretary of Labor to attempt to obtain a correction. The Secretary of Labor has primary jurisdiction over fiduciary conduct under ERISA. *See* 29 U.S.C. § 1132(a). *See also* Williams Statement, 1974 U.S.C.C.A.N. at 5188 ("Under the conference substitute, enforcement of the fiduciary provisions would primarily lie with the Secretary of Labor"). ERISA's legislative history also underscores that the particular concern of the section 4975 tax was self-dealing by ERISA fiduciaries. *See* Conference Report,

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fiduciary, as is very often the case (although not in this case), the Secretary may be able to bring suit to rescind the transaction under ERISA section 502(a)(5). But correction is not "possible" through a civil suit against a nonfiduciary party in interest.[8]

In light of ERISA's language and structure and clear legislative history setting forth separate enforcement mechanisms for fiduciaries and parties in interest, the reference to "obtaining correction" in section 4975 is a slender reed from which to infer liability, especially because the section 4975 tax may not reach nonfiduciary parties in interest. *See* n.7 *supra*. Reliance on the "correction" language is an attempt to bring back through the tax code what Congress deliberately excluded from

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1974 U.S.C.C.A.N. 5076 (section 4975 excise tax "is similar to the approach taken under the present rules against self-dealing that apply to private foundations"). Moreover, if the section 4975 excise tax were limited to fiduciary disqualified persons, the Secretary of Labor might well be able to obtain a correction through civil suit against all such disqualified persons under ERISA section 502(a)(5).

To the extent the Court's dicta in *Mertens* referring to equitable relief against parties in interest applies only to *fiduciary* parties in interest, the Court may have been correct.

[8] In any event, the courts of appeals' "obtain a correction" argument implies only a cause of action by the Secretary of Labor under ERISA section 502(a)(5). The present case involves a suit by a private party under section 502(a)(3).

ERISA.[9] But the fact that Congress did make certain parties in interest responsible to pay the section 4975 tax is all the more reason to believe that the absence of any language creating civil liability in ERISA Title I means that there is no such liability. *Expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another. *See Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 113 S.Ct. 1160, 1163 (1993); *Nat'l Railroad Passenger Corp. v. Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."). This Court has been "unwilling[] to infer causes of action in the ERISA context, since that statute's

[9] If anything, the section 4975 process underscores the very limited role the Secretary of Labor has to play in assessing the contemplated tax on parties in interest. Congress intended to keep separate the enforcement mechanisms under ERISA Title I and Title II. Fiduciary liability is the province of ERISA Title I, consistent with the traditional trust law focus on fiduciaries, while parties in interest are the subject of the tax code. Conference Report, 1974 U.S.C.C.A.N. at 5076, 5087.

To be sure, the Secretary of Labor has limited authority under ERISA section 502(i), 29 U.S.C. § 1132(i), to assess penalties parallel to the IRC section 4975 tax against certain parties in interest for certain prohibited transactions. But that authority does not apply to transactions with respect to plans, like the retirement plan here, covered under ERISA section 401(a), 29 U.S.C. § 1101(a), which are subject only to the section 4975 tax.

carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 113 S.Ct. at 2067 (quoting *Russell*, 473 U.S. at 146-47). The Court should not draw such an inference here.

CONCLUSION

For the foregoing reasons, this Court should hold that ERISA does not authorize a suit for equitable relief against a nonfiduciary party in interest for participation in a prohibited transaction, and reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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